

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
SUPPLEMENTAL
BRIEF**

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TUES APRIL 11

HJP

To be argued by
LESLIE A. BRADSHAW

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

77-2150

UNITED STATES ex rel. LARRY C. MOSLEY,

Petitioner-Appellant,

VS

Docket No. 77-2150

HAROLD J. SMITH, Supt.,
Attica Correctional Facility,

Respondent-Appellee.

B P/S

UNITED STATES ex rel. LORIS McNAIR,

Petitioner-Appellant,

VS

Docket No. 77-2151

FRANCES CLEMENT, Acting Supt.,
Bedford Hills Correctional Facility,

Respondent-Appellee.

On Appeal from the United States District Court
for the Western District of New York

SUPPLEMENTAL BRIEF OF PETITIONERS-APPELLANTS

On Jurisdictional Issue

Dated: March 4, 1978.



Respectfully submitted,

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POINT III

FAILURE TO APPEAL STATE CONVICTION TO U.S. SUPREME COURT
IS NOT BAR TO FEDERAL HABEAS CORPUS.

This court's certificate of probable cause directed the parties to address the question:

"whether the principle of Fay v. Noia, 372 U.S. 391, 435-38 (1963), which overruled Darr v. Buford, 339 U.S. 200 (1950), insofar as that case held that a petitioner must seek a writ of certiorari, applies when the petitioner could have proceeded by direct appeal."

The rationale of Fay v. Noia applies equally to direct appeals to the U.S. Supreme Court as to review by writ of certiorari. The principle that failure to seek certiorari in the Supreme Court does not bar a state prisoner from federal habeas corpus relief was grounded in the language and purpose of 28 USC 2254, which speaks only of exhausting "remedies available in the courts of the State". The U.S. Supreme Court, it was said in Fay, "is not the court of any State".¹

The exhaustion of state remedies doctrine codified in §2254 simply reflects a doctrine of federal-state comity based on the judgment that "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."²

The Fay court continued that comity does not demand that the Supreme Court's resources and time be taxed by applications for review since the state courts will have had their opportunity to pass on

¹ Fay v. Noia, 372 US 391, 436, 9 LEd2d 837, 867, 83 Sct 822 (1963).

² Id., 372 US at 419-20, 9 LEd2d at 857.

the federal questions.³ Further, the State retains the right to petition the Supreme Court for review from any adverse lower federal court decision.⁴

None of the additional reasons for the exhaustion doctrine proffered by commentators⁵ would be advanced by requiring appellate review by the Supreme Court before seeking federal habeas relief. To the contrary, as noted in Fay, the Supreme Court's "function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded in the full and complete record which the lower federal courts on habeas corpus are in a position to provide."⁶

³ Fay v Noia, *supra*, 372 US at 437-38, 9 LEd2d at 868.

⁴ Id., 372 US at 439, 9 LEd2d at 868.

⁵ "Most important is that leaving federal defensive issues to the state criminal courts in the first instance gives those courts a promising opportunity for partnership in the administration of federal law. Hopefully, engagement in that partnership will cause the state courts to look upon the developing register of federal protections to the individual less as alien decrees imposed from distant Washington and more as indispensable conditions for the integrity of local justice, for which they bear responsibility. Considering federal guarantees, as the state courts must, in conjunction with cognate state-law guarantees, those courts may be impelled to developments of state law which give better than federal constitutional protection...."

"Denying federal intervention into unconcluded state criminal proceedings also avoids possibly unnecessary decisions of federal constitutional law. Some number of cases will be resolved in defendants' favor on informal or state-law grounds in the state process, and in still other cases the course of state proceedings will simplify or narrow federal issues. The same state winnowing process will decrease the bulk volume of litigation with which the federal courts must occupy themselves. And it will thereby decrease the number of potential points of friction between the federal courts and state authorities."

Anthony G. Amsterdam, "Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial", 113 U Pa L Rev 793, 830-31 (1965); see, to the same effect, Comment, "Habeas Corpus--Effect of Supreme Court Change in Law on Exhaustion of State Remedies Prerequisite to Federal Habeas Corpus", 113 U Pa L Rev 1303, 1304 (1965).

⁶ Fay v Noia, *supra*, 372 US at 439, 9 LEd2d at 868.

The Fay principle that the exhaustion doctrine is satisfied once the federal question has been fairly presented to the state court system has been reaffirmed by the court.⁷ The limitations placed on Fay by the Francis⁸ and Wainwright⁹ decisions concern its deliberate bypass doctrine relating to state timely objection rules, and bar federal review of issues which have not been resolved on the merits by the state courts because of procedural bars. These limitations have no relevance to the rule dispensing with the necessity of review by the U.S. Supreme Court.

In view of Hicks v Miranda, holding that dismissal of an appeal to the Supreme Court for want of a substantial federal question is a vote on the merits which is binding on inferior federal courts,¹⁰ the Fay principle is even more applicable to appeals than to certiorari.

The Supreme Court never intended for its opportunity for direct review to permit foreclosure of federal habeas relief. Even Darr v Burford, which was overruled by Fay, had taken pains to point out that denial of certiorari was not binding on inferior federal courts and would not foreclose a subsequent federal habeas corpus petition.¹¹

⁷ See, e.g., Picard v Connor, 404 US 270, 275, 30 LEd2d 438, 443, 92 Sct 509 (1971).

⁸ Francis v Henderson, 425 US 536, 48 LEd2d 149 (1976)

⁹ Wainwright v Sykes, ___ US ___, ___ LEd2d ___, 21 CrL 3177, 1181-82 (1977).

¹⁰ Hicks v Miranda, 422 US 332, 344, 45 LEd2d 223, 236, 95 Sct 2281 (1975).

¹¹ Darr v Burford, 339 US 200, 214-16, 94 LEd 61, 772-74 (1950).

Fay emphasized that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."¹²

But plenary review is not and cannot be given by the Supreme Court to most applications for review. Stern and Grossman note that more than half the direct appeals to that court are disposed of summarily on the jurisdictional statement, without oral argument or further briefing, and that as a practical matter, the same discretionary factors that may result in summary disposal of a petition for certiorari may also cause summary disposal of an appeal.¹³ The largest number of appeals summarily disposed of are the kind involved in this case--those from state courts that have upheld state statutes against federal constitutional attack,¹⁴ one study showing that only about 15% of such cases were permitted to be argued.¹⁵

The doctrine of comity to give the state court system the first opportunity to review federal questions is not advanced by requiring an appeal to the highest federal court; such a requirement would effectively bar federal habeas review of state statutes/and deprive the Supreme Court of the more complete record which the inferior federal courts often provide; and neither statutory nor case law requires such a procedure.

¹² Fay v Noia, supra, 372 U.S. at 424, 9 LEd2d at 860.

¹³ Robert L. Stern and Eugene Grossman, Supreme Court Practice (4th ed.)(Bur. Nat'l Affairs, Inc., Washington, D.C., 1969), p. 326.

¹⁴ Id., p. 200.

¹⁵ Id., p. 200, n. 69.

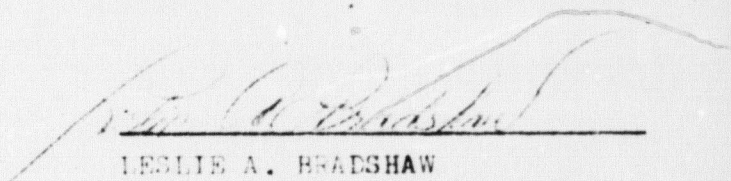
CERTIFICATE OF SERVICE

I certify that on March 6, 1978, I served two copies of the Supplemental Brief of Petitioners-Appellants on the following counsel by U.S. mail, postage prepaid:

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